Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

United States Supreme Court

Life without parole sentence is prohibited for nonhomicide offenses committed by juveniles

When Terrance Jamar Graham reappeared before the court for probation violations relating to an offense of armed burglary and another crime that occurred while he was a juvenile, the Circuit Court revoked his probation and sentenced him to life imprisonment without the possibility of parole. Since the state of Florida does not have a parole system, the life sentence did not include any possibility of release except by executive clemency. Graham appealed and argued the sentence violated the Eight Amendment Cruel and Unusual Punishment Clause but the state's appellate court affirmed the lower court's ruling. Certiorari granted.

The United States Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits sentencing juveniles to life imprisonment without parole when the criminal offense is a nonhomicide crime. For the first time the Supreme Court categorically banned a sentence, other than the death penalty. It reasoned that although nonhomicide crimes "may be devastating in their harm…" they cannot compare to a homicide crime in their "severity and irrevocability." Additionally, it concluded that compared to an adult murderer, a juvenile offender who has not killed or intended to kill may have a twice diminished moral culpability. Furthermore, the court stated that life without parole is a very harsh punishment for a juvenile and would result in a juvenile serving, on average, a greater percentage of his life in prison than an adult offender. Accordingly, it reversed the appellate court's ruling and remanded for further proceedings. *Graham v. Florida*, --- S. Ct. ---, 2010 WL 1946731, (2010).

Civil commitment beyond prison release date for 'Sexually Dangerous Persons' upheld

Multiple cases arose wherein the government sought civil commitment of prisoners to detain them beyond their prison release dates on the basis that they were sexually dangerous persons,

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pursuant to the Adam Walsh Child Protection and Safety Act. The prisoners moved to dismiss the petitions and asserted, among other arguments, that by enacting the statute, Congress exceeded its powers under the Necessary and Proper Clause. The District Court agreed and granted the dismissal. The Fourth Circuit affirmed. Certiorari granted.

The United States Supreme Court relied on five considerations to reach their conclusion, including: (1) the breadth of the Necessary and Proper Clause, (2) the existing history of federal involvement on this issue, (3) the sound rationale for the statute's enactment based on the government's custodial interest in safeguarding the public from dangers posed by those being held in federal custody, (4) the statutes accommodation of state interests and (5) the statutes narrow scope. Taken together, the Supreme Court held that the Necessary and Proper Clause authorizes congress to enact the statute. The judgment of the Fourth Circuit Court of Appeals is reversed and remanded. *U.S. v. Comstock*, --- S. Ct. ---, 2010 WL 1946729 (2010).

Enhancements to attorneys' fees available in extraordinary circumstances

In civil rights cases and pursuant to Title 42 U.S.C. § 1988, courts are authorized to award 'reasonable' attorney's fees for prevailing parties. As such, the District Court awarded fees of $10.5 million, consisting of $6 million based on their calculation of the lodestar and an enhancement of $4.5 million for superior work and results. The fee enhancement was supported by affidavits alleging that the lodestar was insufficient to encourage attorneys of comparable skill and experience to litigate a similar case. The Eleventh Circuit affirmed the judgment. Certiorari was granted on the issue of whether attorney's fees, under federal fee-shifting statutes, based on the lodestar may be increased on the basis of superior performance and results.

The United States Supreme Court reaffirmed prior holdings permitting an enhancement under "extraordinary

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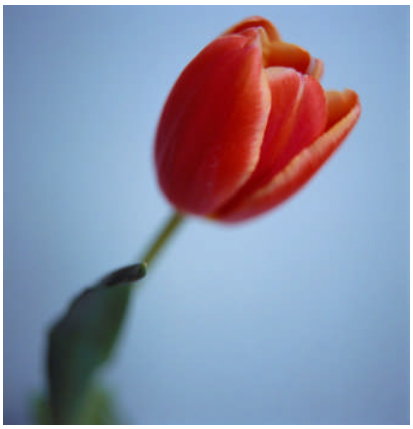
circumstances". However, it went on to also reaffirm that there is a strong presumption that the lodestar fee is sufficient unless the party seeking fees can bear its burden and prove "with specificity' that the enhancement is justified. In this case, the Supreme Court determined that the District Court failed to provide a sufficiently specific justification for the enhancement and as such, it reversed and remanded the case for further proceedings. *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).

Judges to have vast discretion in determining if a jury is deadlocked

Following the conclusion of a very short and noncomplex murder trial, a jury deliberated for less than four hours, during which time they had sent several notes to the judge. The last note inquired as to what would happen if the jury could not agree on a decision. At that point the judge called the jury and attorneys back into the courtroom and inquired of the foreperson whether or not they thought the jury would be able to come to a decision. The foreperson said they could not come to a unanimous decision and the judge subsequently declared a mistrial. Lett was later convicted at a second trial. On appeal, Lett argued that the judge of the first trial announced the mistrial without any manifest necessity to do so. He further asserted that in doing so the Double Jeopardy Clause barred him from being tried a second time. The Michigan Court of Appeals agreed and reversed the conviction. However, the Michigan Supreme Court subsequently reversed the appellate decision. Lett filed a federal habeas petition and argued that the Michigan Supreme Court erred in rejecting his double jeopardy claim and therefore he should not be barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) from being granted relief. The district court agreed and granted relief. The Sixth Circuit affirmed.

The United States Supreme Court, however, disagreed. It explained that the AEDPA was to prevent defendants from using the federal habeas corpus review as a method to second-guess the reasonable decisions of state courts. As such, the Supreme Court held that regardless of whether or not the Michigan Supreme Court's decision to reinstate Lett's conviction was correct, it was "not unreasonable". Appellate court judgment reversed and case remanded. *Renico v. Lett*, 130 S.Ct. 1855 (2010).



Invocation of Miranda rights must be unambiguous

Van Chester Thompkins was fully advised of his *Miranda* rights during a homicide investigation. Although he remained silent, for the most part, during the interrogation, he never actually said that he wanted to remain silent, that he did not want to talk to the investigator or that he wanted an attorney. On occasion he responded to questions with a yes, no, or a nod, and near the end of the interrogation, when asked if he prayed to God to forgive him for the shooting, he answered "yes". Thompkins moved to suppress his statements claiming that he had invoked his right to remain silent by not saying anything for a period of time, but the trial court rejected the argument and denied the motion. On appeal Thompkins again argued that he had invoked his right to remain silent. The District Court held that he had not invoked his right to remain silent and that his pretrial statements were not coerced. The Sixth Circuit reversed.

The United States Supreme Court held that there was good reason to require an unambiguous invocation of the *Miranda* rights. If an ambiguous invocation was permitted, police would be in the position of having to guess whether or not the rights were invoked and ultimately face suppression of evidence if they guessed wrong. As such, since Thompkins failed to state that he wanted to remain silent and not have to talk, he did not invoke his right to remain silent. It went on to hold that Thompkins had waived his right to remain silent because there were no facts to support the conclusion that he did not understand his rights. Furthermore, where his statements were not coerced, and he understood his rights, by knowingly and voluntarily make a statement to police, Thompkins waived his right to remain silent. *Berghuis v. Thompkins*, --- S. Ct. ---, 2010 WL 2160784 (2010).

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PROSECUTOR PROFILE

Scott Fisher,

Salt Lake City Senior Prosecutor

Scott Fisher was born in Denver, Colorado, but raised in Pocatello, Idaho. His father was a physician and his mother was an RN. They taught him by example and were dedicated and hard working in whatever was in front of them. Scott is married with two children and met his wife during a summer in which they were both home in Idaho visiting family for the summer after being away to college at different universities. His time in university extended for many years but he eventually finished his "professional" undergraduate career at the University of Utah in 1988 with a Bachelor of Fine Arts and an emphasis in Graphic Design. He refers to it as a "professional" career, because he acquired credits in almost every subject at the university, from anthropology to wildlife management, and after achieving senior status in engineering, he changed his major to art. Nonetheless, Scott did graduate and then decided to attend law school, which decision he credits to many discussions with his brother who was already in law school. He graduated from the S.J. Quinney College of Law, University of Utah in 1993. After clerking for a couple of years on the civil side of the Salt Lake City Attorney's office, an opening became available in prosecution and he got the job. The rest is history.

In addition to his passion for learning, there are many other interesting tidbits about Scott. His favorite sports team is any team his boys are playing on and his hobby is being able to coach his boys in sports, primarily in lacrosse. If he had to take one genre to the desert isle, it would probably be Irish folk music, The Chieftains, Gaelic Storm, Eileen Ivers, etc. Pizza is Scott's favorite food and Junior Mints are his favorite snack. His favorite movie is The Lord of the Rings trilogy, and he is eagerly anticipating the forthcoming release of The Hobbit. He also reflects upon the observation that as he gets older he is becoming more hobbit-like, with feet and hands becoming larger and hairier and a growing appreciation for food, including second and third breakfasts. Perhaps there is a correlation between his observation and his love for J. R. R. Tolkien's works. Scott's favorite TV series is Gilligan's Island because it has provided hours of entertainment and laughter for him as a child and now for his boys. His favorite cartoons are Bloom County and Calvin and Hobbes. The furthest he has ever traveled is St. Petersburg, Russia but looks forward to the dream of traveling to Hawaii every year with his wife. Scott's claims an "apparently futile attempt" to learn Spanish and some remnants of high school German.

Scott's most rewarding and memorable part of his career in prosecution came in the form of a case, previously marked for dismissal, where he was able to identify and pursue the case as a candidate for admission of excited utterance evidence because the victim was deceased from a transplant rejection. The case began before Crawford issued, then changed course because of Crawford issuing, involved a dynamic, hard-fought jury trial, and the defense's subsequent appeal generated needed case-law in Utah. His funniest in-court experience involved a defendant who was in jail and up for sentencing. When the court asked what unique talents the defendant brought to the world, the defendant's claim to fame was being a 'strange-object-juggler'. The court ordered that he be uncuffed, and the defense attorney provided a hard-sided briefcase for the demonstration. The defendant proceeded to toss and juggle the briefcase with considerable talent about the courtroom. And of course, there is always a moment one wishes to forget and since it can't be forgotten, it might as well be shared throughout Utah! That moment for Scott involved starting to write on what appeared to be a white board, in the middle of a jury trial, only to find out it was actually a soft projection screen that absorbed the ink from the marker and subsequently marred the screen!

Scott says the quality that sets him apart from other prosecutors is, if anything, that he is too bull-headed to know when to quit. Thanks Scott, Salt Lake City is lucky to have you so don't ever quit!

PREFERRED NAME - Scott

NICKNAMES: Scooter

BIRTHPLACE - Denver, CO

FAMILY - Has one brother and is the father of two boys, aged 11 & 14

PETS - German Shepherd named Zora

FIRST JOB - staining slides in a pathologist's laboratory

OTHER JOBS: Bookstore clerk, silk-screen artist's production assistant, food server, graphic designer

FAVORITE BOOK - *Lord of the Rings*, by J.R.R. Tolkien

LAST BOOK READ - *Cracker*, by Cynthia Kadohata

FAVORITE QUOTE - "The secret of power is knowing when not to use it." ~unknown

"Another day filled with opportunities for excellence." ~unknown

LEGAL BRIEFS

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Utah Supreme Court

911 dispatch information plus officer's coinciding observations equals reasonable suspicion

Jose Baltarcar Roybal and Annalee McCaine got into a dispute and McCaine called 911 to request assistance. During the call she told the dispatcher that they both had been drinking and that Roybal was getting ready to leave in his van. An officer responding to the call came upon Roybal and started to follow him. The officer noted Roybal was driving excessively slowly and in a manner that appeared as if he was trying to avoid the police vehicle. The officer made the traffic stop and on the basis of the smell of alcohol and Roybal's failure of a number of field-sobriety tests, he was placed under arrest. Roybal moved to suppress the evidence from the traffic stop arguing that there was insufficient reasonable suspicion to support the stop. The trial court denied the motion and Roybal subsequently entered a conditional plea. On appeal the court reversed the trial court's decision and agreed with Roybal's claim that the traffic stop was not sufficiently supported by reasonable suspicion. The government petitioned for certiorari review, which was granted.

The Utah Supreme Court held that the officer was justified in stopping Roybal on the basis that there were sufficient facts and information provided to the 911 dispatcher to create reasonable suspicion that Roybal was driving while intoxicated. In addition, the officer's observations did not contradict that suspicion; therefore, the officer was entitled to rely on the 911 dispatch report to justify the traffic stop. Reverse and remanded. *State v. Roybal*, 2010 UT 34.

City had duty to exercise its water right in a reasonable manner under the circumstances

In an action brought by property owners against Roosevelt City, they appeal the summary judgment granted against them and argue that the city diverted water from an aquifer in a manner that resulted in a lower water table which caused the soil to be less saturated for irrigation purposes. The complaint asserts three causes of action: interference with water rights, takings, and negligence. The district court granted summary judgment, in favor of the city, on all three claims.

On appeal the Utah Supreme Court affirmed the granting of summary judgment on the takings and interference of water rights claims. It reasoned that the owners' interest in the water was insufficient to garner protection under constitutional standards and therefore was not a taking. It further reasoned that although the interference claim was not barred by the Governmental Immunity Act of Utah, the merits of the claim justified the ruling. However, it held that the court erred in granting summary judgment on the negligence claim by incorrectly concluding that the city had no duty to exercise its water right in a reasonable manner. Additionally, it held that conduct alleged in the complaint constituted continuing negligence sufficient to toll the statute of limitations. Accordingly, it affirmed in part and reversed in part. *Bingham v. Roosevelt City Corp.*, 2010 UT 37.

Special mitigation statute is not an affirmative defense

Eryk Drej challenges the constitutionality of the special mitigation statute enacted by the Utah Legislature nearly a decade ago. It was enacted for the purpose of mitigating criminal culpability in instances of a defendant acting under the influence of a delusion due to mental illness. Drej is the first to address the constitutionality of the statute and argues that it is unconstitutional because it places the burden of proof for special mitigation on the defendant which is a violation of due process rights. The district court held that special mitigation is not equivalent to an affirmative defense since it merely reduces the severity of punishment. Drej filed a petition for interlocutory appeal urging the court to strike unconstitutional segments of the statute and leave special mitigation with the burden of disproving the defense on the prosecution.

The Utah Supreme Court held that the special mitigation statute was constitutional under both state and federal law. It reasoned that special mitigation is neither an affirmative defense nor a substantive offense to be charged against a defendant. It also found it constitutional under the state's separation of powers provision and that it was constitutionally permissible to enact the statute by a simple majority vote.

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LEGAL BRIEFS

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Finally it held that the statute was constitutional under the equal protection clause because it did "not impose disparate treatment on similarly situated persons." Affirmed. *State v. Drej*, 2010 UT 35.

Charging in the alternative within a single count allows defendant to plead to lesser offense

After an evening of shooting with friends, Jacob Loveless emptied his gun by shooting into what he thought was a stand of trees. In doing so he shot a fellow camper who had gone off to get some sleep and was lying down amidst the trees. Loveless was charged with one count of carrying a dangerous weapon while under the influence of alcohol or drugs and one count of "aggravated assault or, in the alternative, reckless endangerment." Loveless entered a plea to reckless endangerment over the objections of the State who argued that Loveless could not unilaterally decide to enter a plea of guilty to the lesser alternative charge. The court rejected both the State's objection and any efforts to dismiss the lesser offense. It ruled that Loveless was given the option to plead to the one charge or the other when it filed the charges under a single count. The State filed a petition for interlocutory appeal. The appellate court affirmed the trial court's ruling. Certiorari granted.

The Utah Supreme Court recognized that prosecutors have authority to charge in the alternative; however, charging in the alternative within a single count creates the opportunity for a defendant to plead guilty as charged to the lesser of the offenses. To avoid this risk, prosecution must charge each offense in separate counts. Affirmed. *State v. Loveless*, 2010 UT 24.

Forfeiture by wrongdoing to be proven using properly admitted evidence

Christian E. Poole entered conditional guilty pleas to three counts of rape of a child, involving his daughter as the victim. Immediately after his arrest, the victim, C.P., was moved by her mother to Idaho and separate counsel was obtained to protect her rights. Fearing that the victim would refuse to testify, the State attempted to elicit her testimony at a deposition and again two months later at a pretrial motion hearing. On both occasions C.P. refused to answer any questions posed by the prosecution. Believing C.P. to be unavailable for trial, the state requested that the court find Poole had forfeited his right to confront C.P. through wrongful acts, resulting in the admission of her out-of-court statements at trial. The court found that Poole "worked in conjunction with his wife to pressure, manipulate and threaten C.P. into refusing to testify." Accordingly, the court ruled that Poole forfeited his right to confrontation. Based on the ruling that C.P.'s out-of-court statements were admissible at trial, Poole entered into a plea agreement. Poole appealed the court's decision on forfeiture by wrongdoing that made permissible the admission of C.P.'s statements.

The Utah Supreme Court expressly recognized the doctrine of forfeiture by wrongdoing under Utah law and that the burden of proof falls under the preponderance of evidence standard. To prove the witness is unavailable through the wrongful acts of the defendant, the state must make a showing of evidence properly admitted pursuant to the Utah Rules of Evidence. In addition, it held that in this case, the trial court's forfeiture ruling was premature because the ruling occurred five or so months prior to the trial, which the court found to be too distantly removed from the date of the trial proceeding. Given the lengthy time lapse, the Utah Supreme Court refused to hold that C.P. was unavailable at trial and granted Poole the option to withdraw his guilty pleas. *State v. Poole*, 2010 UT 25. (***Note to Prosecutors***: Defense counsel may cite the following language from paragraph 26 to argue hearsay may not be used to show forfeiture: "we note that the district court may not consider hearsay evidence in evaluating the admission of out-of-court statements on the basis of forfeiture by wrongdoing...." Prosecutors may consider countering that it cannot mean what it seems to say, because: (1) the URE allows for introduction of hearsay under certain exceptions, and (2) *Giles* contemplates hearsay is admissible to show forfeiture: "Statements to friends and neighbors about abuse and intimidation...would be excluded, if at all, only by hearsay [state] hearsay rules...." *Giles*, 128 S.Ct. 2678, 2692. The way this can come up in domestic violence is, for example, victim tells the prosecutor of her refusal

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to testify. Then domestic violence detective learns from victim's co-worker that victim told co-worker that defendant threatened to harm victim in some manner if victim testified. Then, at a forfeiture hearing, co-worker testifies about what victim said (hearsay) to co-worker at work, thus establishing forfeiture. If the defense raises this language from *Poole*, at ¶ 26, co-coworker's statement comes into evidence at the forfeiture hearing under URE 807 "trustworthiness" exception, which still exists outside of trial, since sixth amendment analysis, as interpreted by Crawford, applies only to trial, and so "trustworthiness" and other state hearsay analysis has survived Crawford for hearings outside of the trial context.)

Utah Court of Appeals

Criminal punishment sought after imposition of an administrative fine does not trigger double jeopardy

Harold Bushman entered a conditional guilty plea to one count of securities fraud and six counts of attempted securities fraud. He appeals the denial of his motion to dismiss all criminal charges. In that motion and on appeal, Bushman argues that he had already been punished for the offenses when he signed a Stipulation and Consent Order with the Utah Division of Securities. That agreement required payment of an administrative fine for violation of the Utah Uniform Securities Act. Accordingly, Bushman argues that the court erred in denying his motion to dismiss on double jeopardy grounds.

The Utah Court of Appeals held that the court did not err in denying Bushman's motion to dismiss the criminal charges. It reasoned that the fine imposed by the Securities Division was a civil penalty and did not constitute a criminal punishment, therefore, it did not implicate the Double Jeopardy Clause and the State was not barred from seeking and obtaining subsequent criminal convictions. Affirmed. *State v. Bushman*, 2010 UT App 120.

Shondel doctrine requires elements of crime to be truly identical

Frank C. Coble exposed his genitalia and masturbated via web camera to whom he believed to be a fourteen-year-old girl. The child was in fact an undercover officer who downloaded still photographs of the performance. Coble was charged with distributing pornographic material and a preliminary hearing was held. After hearing arguments from both sides, the court concluded that although Coble's exposure of himself came within the definition of distributing pornographic material, the act also fell within the definition of lewdness. It then applied the *Shondel* doctrine and determined that the elements of both offenses were wholly duplicative. 453 P.2d 146, 148 (Utah, 1969). Accordingly, the court denied the State's motion for bindover and ruled that the prosecution could only proceed on the misdemeanor lewdness charge. The State petitioned for interlocutory appeal.

The appellate court held that the *Shondel* doctrine did not apply because the doctrine states that, "where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser." However, the court reasoned that case law has clearly established that the doctrine is limited to cases where the elements of two different crimes are truly identical. In this case, the elements of the two crimes require prosecution to prove that the material distributed is pornographic as opposed to merely lewd. Since these elements differ *Shondel* does not apply. Reversed and remanded. *State v. Coble*, 2010 Utah App 98.

Demonstrably limited ability to speak and understand English is necessary for an interpreter to be required

Adama Jadama was charged and convicted of aggravated arson. During pretrial hearings the issue of an interpreter was raised on the basis that Jadama spent the first nine years of his life in Gambia, and although he attended an English speaking school there, received English tutoring upon entering the United States, graduated from High School and attended a community college, he alleged that his English was not very good and he would be more comfortable with an interpreter. The court engaged in discussing the issue on several occasions but after numerous conversations during hearings and due to difficulty in locating an interpreter, the court determined that Jadama spoke and understood English well enough and an interpreter was not necessary. The case proceeded to trial, Jadama was convicted and he appealed

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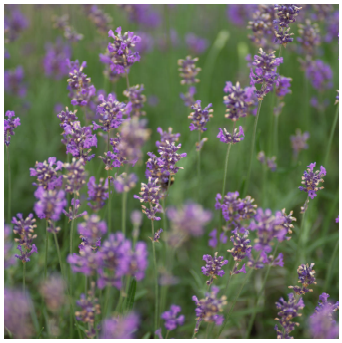
on this issue, among others.

The Utah Court of Appeals explored the discussion and decisions relative to appointing an interpreter for Jadama. It held that the trial court did not err in determining that an interpreter was unnecessary. It reasoned that the right to an Interpreter does not extend to *any* defendant who speaks English as a second language, but rather, a demonstrably limited ability to speak and understand English is necessary for an interpreter to be required. Affirmed. *State v. Jadama*, 2010 UT App 107.



Notice to defendant of accomplice liability is not an issue because accomplices incur the same liability as principals

D.B. and another juvenile were charged with several counts of criminal conduct involving the boys attempting to break a gate padlock and gain access to a construction site. The court found D.B. guilty, as an accomplice, of theft and criminal trespass. On appeal D.B. argued that the juvenile court's finding of guilt on the theory of accomplice liability violated his due process rights. He reasons that his guilt as an accomplice was neither alleged nor argued at trial. Furthermore, he argues that he was not bound by appellate preservation rules because he was not obligated to raise the objection at trial since he had no indication that the State was pursuing a theory of accomplice liability.

The appellate court disagreed and stated that D.B. was given notice that the accomplice liability theory was an issue because "accomplices incur the same liability as principals." The court also held that D.B. could have objected and alerted the court at the time the finding of guilt was entered or by postjudgment motion, neither of which occurred. Accordingly, D.B.'s failure to preserve the issue at trial, at adjudication or postjudgment denied the juvenile court the opportunity to address the claimed error. Having failed to preserve his claim, the juvenile court's determination is affirmed. *D.B. v. State (In re D.B.)*, 2010 Utah App 111.

Tenth Circuit Court of Appeals

Warrantless entry permissible to negate threat as well as to rescue victim

Police received tips that a bomb threat would be called into a school and when the students were evacuated a gang would execute a shooting. Specific information was gathered from the tips and all information matched a recently expelled juvenile student named Chris Armijo. When the bomb threat was called in, the school was placed on lock down and police responded to Armijo's home. A second bomb threat was called in which police believed was due to the shooting plan being thwarted by the lock down. After no response at the door of the Armijo residence, police entered the home and conducted a search for the suspect. They located Armijo, but neither his cell phone nor home number matched the numbers from where the threats were received. The duration of the search and detention was approximately 20 minutes and then officers left the residence. Armijo's mother filed a § 1983 action against the law enforcement officers claiming they violated her son's Fourth Amendment rights when they entered her home without a warrant and detained Armijo as a suspect. The District Court denied the officers' summary judgment based on qualified immunity. Officers appealed.

The U.S. Court of Appeals for the Tenth Circuit broadly applied the protective-sweep rule from Maryland v. Buie, 494 U.S. 325 (1990), and held that under the Fourth Amendment's exigent circumstances doctrine, warrantless entry of a home is permissible if law enforcement reasonably believes "that some actor or object in a house may immediately cause harm to persons or property not in or near the house." Therefore, since officers believed Armijo was involved in the bomb threat and shooting plot, they were justified in entering the residence and are entitled to qualified immunity. Reversed and remanded. *Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d 1065 (10th Cir. 2010).

Addition of charges was proper response to denial of evidence of prior bad acts

A federal grand jury indicted Johnny Begay on one count of aggravated sexual abuse of a child in Indian Country. Prior to trial the prosecution filed a

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18 Month MCLE Compliance Period

~~REMINDER ~~

(Don't get caught on July 1st with your CLE down!)

Notice has been sent out by the MCLE Office and by UPC that the MCLE Office is in the process of changing compliance years from a calendar year to a fiscal year – July 1 - June 30. In order to accomplish this, the MCLE Board has shortened the current compliance period for all attorneys licensed to practice in Utah to 18 months. It works as follows.

EVEN YEAR COMPLIANCE (Those who's last reporting cycle ended December 31, 2008.)	Your current MCLE compliance period began on January 1, 2009, and will end on June 30, 2010. Your MCLE compliance report will be due by July 31, 2010.
ODD YEAR COMPLIANCE (Those who's last reporting cycle ended December 31, 2009.)	Your current MCLE compliance period began on January 1, 2010, and will end on June 30, 2011. Your MCLE compliance report will be due by July 31, 2011.

During these shortened compliance periods only, each attorney must obtain 18 hours of MCLE approved training, including one hour of Ethics/Professional Responsibility AND one hour of Civility/Professionalism. Unlike past years, civility credit does not cover your general ethics requirement, or vice versa.

So, How Can I Pick Up the Hours I need?

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Self Study: UPC has a wide variety of self study lectures available, either on DVD or on-line. No charge.

2009 Fall Prosecutors Training Conference and the 2009 Government Civil Practice Conference (on-line): Go to the UPC website: www.upc.utah.gov, go to the right side and click on 2009 Fall and Civil Training Videos. Make sure to note the user name and password so you will be able to gain access.

UPC website: Select from a wide variety of lectures from the National Advocacy Center. Those are available on DVD. To borrow a DVD call UPC at (801) 366-0202.

Utah State Bar: Go to http://www.legalspan.com/utah/catalog.asp. There the Utah State Bar has a large number of MCLE approved presentations on a wide variety of topics. NOTE: the Bar charges a fee to watch these presentations.

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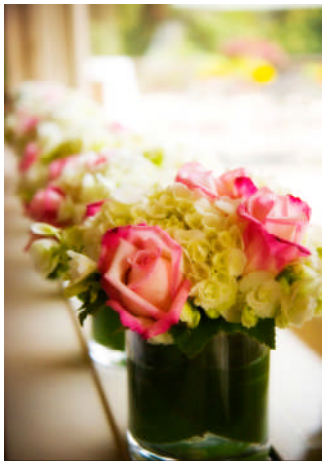
motion in limine requesting approval to introduce testimony of prior bad acts by Begay, involving the victim and two other persons. Although the district court agreed that the evidence was relevant and admissible, it denied the request on the basis that the evidence was more prejudicial than probative. Prosecution appealed the decision, however, it was affirmed. Accordingly, prosecution obtained a superseding indictment for seven counts of aggravated sexual abuse of a child in Indian Country, which included the prior bad acts that prosecution previously sought to have admitted as testimony. Begay moved to dismiss the superseding indictment claiming that prosecution excessively delayed the indictment and violated his Due Process rights. The District Court agreed and granted the dismissal. Prosecution filed an interlocutory appeal.



The Tenth Circuit held that the district court erred in dismissing the superseding indictment. It found that the record firmly supported the government's aggressive, yet fair, pursuit of Begay's prosecution. It further reasoned that absent prosecutorial vindictiveness or prejudice to Begay, it was entirely proper for the government to alter its tactics and seek the additional criminal offenses once the court had denied their request to allow the evidence of prior acts. Reversed and remanded. *U.S. v. Begay*, 602 F.3d 1150 (10th Cir. 2010).

Other Circuits

Unrelated inquiries may prolong length of traffic stop

After helping his estranged wife move, Harvey Everett drove to his tax preparation company. He had, in his vehicle, some of his belongings that had previously been stored by his wife. The property included a shotgun. A police officer pulled in behind Everett because he was speeding. However, upon approaching Everett and requesting his license and registration, the officer learned that his license was suspended. At that point she also noticed the smell of alcohol on his breath and asked him to step out of the vehicle. She then asked him if he had anything illegal or possessed any weapons. Everett admitted he had an open can of beer and the shotgun, which he knew he wasn't supposed to have because he was a convicted felon. The officer also discovered marijuana during a pat-down. Everett was later indicted on the federal offense of possession of a firearm as a felon. Everett moved to suppress the evidence arguing that his rights were violated when the officer asked about weapons or narcotics because she lacked any independent reasonable suspicion to justify the inquiry. Ultimately the trial court denied the motion and Everett appealed.

The Sixth Circuit held that the U.S. Supreme Court's most recent case, *Arizona v. Johnson*, allowed officers to ask questions unrelated to the purpose of the traffic stop even if the length of the stop is prolonged, so long as its duration is not 'measurably' extended. Affirmed. *U.S. v. Everett*, 601 F.3d 484 (6th Cir. 2010).

Courthouse holding cell is not an 'Institution' under RLUIPA

Souhair Khatib was required to remove her headscarf in public while waiting in a courthouse holding cell pending the disposition of a probation violation. She sued the County of Orange, California alleging that requiring her to remove the headscarf, against her Muslim religious beliefs, violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). The trial court dismissed her complaint holding that the cell is not an "institution" as defined by RLUIPA. She appealed.

The Ninth Circuit held that Congress did not intend for the phrase "pretrial detention facility" to apply to courthouse holding facilities. It reasoned that frivolous prisoner litigation would be a threat in such an application of the definition because stays never exceed twelve hours and officials would not have time to address grievances internally prior to the initiation of litigation. Affirmed. *Khatib v. County of Orange*, 603 F.3d 713 (9th Cir. 2010).

Drawing attention to dangerous ammunition in firearms case allowed

Vince Byers appeals his conviction for unlawful possession of a firearm and alleges prosecutorial misconduct because the prosecutor repeatedly brought out the fact that the guns involved in the

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case were located with hollow-tipped bullets and an extended magazine that was capable of holding 30 rounds. He argues that these facts are irrelevant to the possession charge and amounted to prosecutorial misconduct. He further argues that the court erred in instructing the jury that the duration of time a firearm was possessed was not relevant.

The Eighth Circuit disagreed with Byers and held that evidence of the characteristics of the ammunition and firearms was relevant because it provided the jury with the context in which the crime occurred. It further held that the trial court did not err in giving the jury instruction that the period of time the firearms were possessed was not relevant. Affirmed. *U.S. v. Byers*, 603 F.3d 503 (8th Cir. 2010).

Other States

Prosecution has standing to challenge subpoena duces tecum issued on prosecution witness

Randall Schreibvogel was convicted of two counts of first degree sexual assault and one count of robbery for sexually assaulting a woman at a hair salon and stealing the money from the tip jar as he left. Prior to trial Schreibvogel attempted to subpoena the victim's financial records to attack her credibility. The prosecution moved to quash the subpoena and argued that it had standing to do so to protect the victim from harassment and in the interest of judicial economy by avoiding a lengthening of the trial proceeding. The trial court granted the motion to quash. Schreibvogel appeals and argues that the government did not have standing to bring the motion and therefore, the court erred in granting it.

The Supreme Court of Wyoming relied on *State v. Decaro*, 745 A.2d 800 (Conn. 2000), issued by the Connecticut Supreme Court, to hold that prosecution has standing in a criminal case to move to quash a subpoena issued on a prosecution witness. It reasoned, based on the Connecticut court wording, that the state had a valid interest in "preventing undue lengthening of the trial" and "undue harassment of its witnesses". Affirmed. *Schreibvogel v. State*, 228 P.3d 874 (Wyo. 2010).

Incorrect statements of officer nullifies *Miranda* warning

Terries Terrell Luckett shot his wife to death and then shot the man he believed was having an affair with his wife. After the shootings Luckett attempted suicide by slitting his wrists, however, failing to succeed in that attempt he jumped on the metro train platform, in front of an incoming train. He was pulled from the tracks and rushed to the hospital where he underwent extensive surgery, had his legs amputated from the injuries, but nonetheless survived. Upon waking up after the surgeries, he began to talk to the detective posted in his room. After giving Luckett the full *Miranda* warning, the detective then added clarifications and explanations of those rights, which, although not maliciously intended to be so, were not accurate as it related to the right to counsel. Luckett made a motion to suppress his statements which motion was granted by the trial court. The Court of Special Appeals affirmed. The State petitioned for writ of certiorari, which was granted.

The Court of Appeals of Maryland held that the detective's incorrect statements clarifying and explaining the otherwise properly rendered *Miranda* warning, nullified the *Miranda* advisement and rendered it constitutionally infirm. Accordingly, Luckett's waiver of his rights was invalid and any post-waiver statements obtained during the interrogation must be suppressed. Affirmed. *State v. Luckett*, 993 A.2d 25 (Md. 2010).

End of **BRIEFS**

ADMISSIBILITY OF INTOXILYZER CERTIFICATION REPORTS

By Lana Taylor, Assistant Attorney General
Counsel to the Utah Department of Public Safety

Recently, there have been a number of inquiries regarding the admissibility of the new the Certification Reports currently in use by the Utah Highway Patrol intoxilyzer technicians. The changes to the report were designed to meet all of the requirements for admissibility under the applicable statutes and be self-authenticating under the Utah Rules of Evidence.

Utah Code Ann. § 41-6a-515(1), provides that the Commissioner of the Department of Public Safety "shall establish standards for the administration and interpretation of chemical analysis of a person's breath or oral fluids, including standards of training." These standards are found in Utah Administrative Code R714-500, which describes the procedures that a technician must comply with in order to certify that an intoxilyzer is working properly. The rule specifically provides that "a report of the certification results with the serial number of the certified instrument shall be recorded on the approved Certification Report form by the technician, sent to the program supervisor, and placed in the file for certified instruments." U.A.C. R714-500.6.D.5.

This report is then admissible in a criminal DUI trial or an administrative driver license appeal to prove that the instrument used was accurate if:

> (a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and
>
> (b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

U.C.A. § 41-6a-515(2). If the judge does find that the standards established under the statute and the conditions for admissibility have been met, "there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary." U.C.A. § 41-6a-515(3).

The Certification Report was designed to comply with the requirements of Utah Code Ann. § 78B-5-705[1], which allows the use of unsworn declarations in lieu of notarized affidavits under the Utah court rules. In addition, the Certification Report contains all of the information necessary to make the report admissible under Rule 803 of the Utah Rules of Evidence and is self-authenticating under Rule 902[2]. Therefore, the report should be admissible under the Rules of Evidence even though it is not notarized and is not accompanied by a certificate of authenticity.

Please see the following page for footnotes

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[1] Utah Code Ann. § 78B-5-705 states:

(1) If the Utah Rules of Criminal Procedure, Civil Procedure, or Evidence require or permit a written declaration upon oath, an individual may, with like force and effect, provide an unsworn written declaration, subscribed and dated under penalty of this section, in substantially the following form:

"I declare (or certify, verify, or state) under criminal penalty of the State of Utah that the foregoing is true and correct.
Executed on (date).
(Signature)".

(2) Anyone who knowingly makes a false written statement as provided under Subsection (1) is guilty of a class B misdemeanor.

[2] Rule 902(11) of the Utah Rules of Evidence provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to certified domestic records of regularly conducted activity. According to the rule, the original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) is admissible if it is "accompanied by an affidavit or a written declaration of its custodian or other qualified person, certifying that:

(A) the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) the record was kept in the course of the regularly conducted activity;

(C) the record was made by the regularly conducted activity as a regular practice; and

(D) the person certifying the records does so under penalty of making a false statement in an official proceeding.

The affidavit or declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

On the Lighter Side

Closing argument by pro se defendant charged with Possession of Firearm by Convicted Felon:

"Ladies and Gentleman of the Jury, I did not possess that gun. I will admit that the gun was mine and I will admit that the gun was in my pocket but I did not possess that gun."

Jury returned with a verdict of Guilty in 17 minutes.

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From a deposition:

Q. Isn't it true you didn't even give your wife a Valentine's day present?

A. That is not true. I gave her flowers.

Q. Isn't it true you gave them to her on *February 15th*?

A. Well… yes… they are cheaper the day after Valentines. On Valentine's day I gave her an IOU for the next day. It's the thought that counts, though, right? Wait…will she see this testimony?

Q. Yes, she will.

A. Dang… better stop on the way home and get some flowers.

Q. Why don't you pick up some day old bread, too, Romeo…

~~~~~~~~~~

As a new attorney many years ago I was defending a man in a domestic violence restraining order action. His wife alleged he hit her on August 8 of that year. In our pre-trial meetings he vehemently denied that accusation.

In court, after setting up what otherwise would have been a brilliant defense, the final testimony was the following:

Q. Your wife alleges in her complaint that you hit her on August 8th. Is that true?

A. No. Not at all. I hit her about a week before that.

The Judge entered the restraining order!

~~~~~~~~~~

Did you hear about the terrorists who took a courthouse full of lawyers hostage?

They threatened to release one every hour unless their demands were met.

DO YOU HAVE A JOKE, HUMOROUS QUIP OR COURT EXPERIENCE?
We'd like to hear it! Please forward any jokes, stories or experiences to mwhittington@utah.gov.

Submission does not ensure publication as we reserve the right to select the most appropriate material available and request your compliance with copyright restrictions. Thanks!

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Visit the UPC online at

www.upc.utah.gov
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2010 Training Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

June 16-18	LEOJ: FIREARMS TRAINING FOR PROSECUTORS, ET AL *The only course to qualify for the LEOJ CCW permit. See UCA 53-5-711(2)(b).* *To register, email Ken Wallentine at kenwallentine@utah.gov. Space is limited.*	Camp Williams Salt Lake County
June 24-25	UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE *Outstanding training for non-attorney staff in prosecution offices*	University Marriott Salt Lake City, UT
August 5-6	UTAH MUNICIPAL PROSECUTORS ASSOCIATION SUMMER CONFERENCE *For all prosecutors whose caseload consists primarily of misdemeanors*	Zion Park Inn Springdale, UT
August 16-20	BASIC PROSECUTOR COURSE *A must attend course for all new prosecutors, or those new to prosecution*	University Inn Logan, UT
September 22-24	FALL PROSECUTOR CONFERENCE *The annual fall professional training event for all Utah prosecutors*	Yarrow Hotel Park City, UT
October 20-22	GOVERNMENT CIVIL PRACTICE CONFERENCE *For public attorneys who work the civil side of the office*	Moab Valley Inn Moab, UT
November 17-19	ADVANCED TRIAL ADVOCACY SKILLS COURSE *Advanced training for those with 5+ years and lots of trials under their belt*	Hampton Inn & Suites West Jordan, UT

NATIONAL COLLEGE OF DISTRICT ATTORNEYS (NCDA)* AND OTHER NATIONAL CLE CONFERENCES

July 11-14	NDAA SUMMER CONFERENCE		Napa, CA
August 23-27	STRATEGIES FOR JUSTICE	Register	National Harbor, MD
August 31– Sept. 3	ASSN OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION *Indispensable training and info for any prosecutor who has a capital case* *For more info: www.agacl.com, contact Jan Dyer at (602) 938-5793 or agacl@msn.com*		San Diego, CA
Sept. 27– Oct. 1	SAFETYNET	Agenda	Easton, MA
October 27-31	ANNUAL DOMESTIC VIOLENCE CONFERENCE		Washington, DC

For a course description, click on the course title (if the course title is not hyperlinked, the sponsor has yet to put a course description on-line). If an agenda has been posted there will be an "Agenda" link next to the course title. Registration for all NDAA sponsored courses is now on-line. To register for a course, click either on the course name or on the "Register" link next to the course name.

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2010 Training Calendar

NATIONAL ADVOCACY CENTER (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title. ***Effective February 1, 2010, The National District Attorneys Association will provide the following for NAC courses: course training materials; lodging [which includes breakfast, lunch and two refreshment breaks]; and airfare up to $550. Evening dinner and any other incidentals are NOT covered.*** For specifics on NAC expenses click here. To access the NAC on-line application form click here.

August 9-13	BOOTCAMP *A course for newly hired prosecutors* ***The registration deadline is June 11, 2010***	Register	NAC Columbia, SC
See the matrix	TRIAL ADVOCACY I *A practical "hands-on" training course for trial prosecutors*	Register	NAC Columbia, SC

Course Number	Course Dates	Registration Deadlines
07-10-TAI	August 16-20	June 18, 2010
08-10-TAI	September 27 - October 1	July 23, 2010
09-10-TAI	November 15-19	September 8, 2010

August 3-6	CROSS EXAMINATION *An in-depth examination of the theory and method of effective cross*	Register	NAC Columbia, SC
August 23-27	UNSAFE HAVENS II *Advanced trial advocacy training for prosecution of technology-facilitated Child sexual exploitation cases*	Register	NAC Columbia, SC
September 13-17	COURTROOM TECHNOLOGY *Upper level PowerPoint; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmartDraw, Sketchup); Design Tactics*	Register	NAC Columbia, SC